

U.S. Department of
Homeland Security

**United States
Coast Guard**



Director
National Pollution Funds Center
United States Coast Guard

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5890/DWHZ
26 July 2012

La Trattoria


Re: Claim Number: N10036-1832

Dear Mr. Kralicek:

The National Pollution Funds Center (NPFC), in accordance with the Oil Pollution Act of 1990, 33 U.S.C. § 2701 et seq. (OPA) and the associated regulations at 33 C.F.R. Part 136, denies payment on the claim number N10036-1832 involving the Deepwater Horizon oil spill. Please see the attached Claim Summary/Determination Form for further explanation.

You may make a written request for reconsideration of this claim. The reconsideration must be received by the NPFC within 60 days of the date of this letter and must include the factual or legal basis of the request for reconsideration, providing any additional support for the claim. However, if you find that you will be unable to gather particular information within the time period, you may include a request for an extension of time for a specified duration with your reconsideration request.

Reconsideration of the denial will be based upon the information provided. A claim may be reconsidered only once. Disposition of that reconsideration in writing will constitute final agency action. Failure of the NPFC to issue a written decision within 90 days after receipt of a timely request for reconsideration shall, at the option of the claimant, be deemed final agency action. All correspondence should include claim number N10036-1832.

Mail reconsideration requests to:

Director (ca)
NPFC CA MS 7100
US COAST GUARD
4200 Wilson Blvd, Suite 1000
Arlington, VA 20598-7100

Sincerely,



Claims Adjudication Division
National Pollution Funds Center
U.S. Coast Guard

Enclosure: Claim Summary/Determination Form

CLAIM SUMMARY/DETERMINATION FORM

| | |
|------------------|--|
| Claim Number | N10036-1832 |
| Claimant | La Trattoria, Inc. |
| Type of Claimant | Private (US) |
| Type of Claim | Loss of Profits and Impairment of Earning Capacity |
| Amount Requested | \$360,810.67 |

FACTS

On or about 20 April 2010, the Mobile Offshore Drilling Unit Deepwater Horizon (Deepwater Horizon) exploded and sank in the Gulf of Mexico. As a result of the explosion and sinking, oil was discharged. The Coast Guard designated the source of the discharge and identified BP as a responsible party (RP). BP accepted the designation and advertised its OPA claims process. On 23 August 2010, the Gulf Coast Claims Facility (GCCF) began accepting and adjudicating certain individual and business claims on behalf of BP.

On 08 March 2012, the United States District Court, Eastern District of Louisiana issued a "Transition Order" (TO) limiting the GCCF's ability to accept, process, or pay claims except as provided in that order. The TO created a Transition Process (TP) to facilitate the transition of the claims process from the GCCF to a proposed Court Supervised Settlement Program (CSSP). The Court granted Preliminary Approval of the proposed settlement agreement on 2 May 2012, and the CSSP began processing claims on 4 June, 2012.

CLAIM AND CLAIMANT

On 30 May 2012, Mr. Jiri Kralicek, on behalf of La Trattoria (collectively, the Claimant) presented a claim to the Oil Spill Liability Trust Fund (OSLTF) seeking \$360,810.67 in loss of profits and impairment of earning capacity damages resulting from the Deepwater Horizon oil spill.¹

The Claimant is a co-owner and Director of La Trattoria, a restaurant located in Fort Myers, Florida, which opened for business on 15 June 2009.² The Claimant alleged that the oil spill caused the restaurant to sustain a revenue drop of 50% which left the Claimant unable to pay rent and forced the business to close. The Claimant stated, "[w]e believe that a major part of the revenue decrease was caused by what happened in [the] Gulf of Mexico on [A]pril 20th 2010. [The tourism] and hospitality industry was [a]ffected all over the coast."³

In sum, the Claimant seeks \$360,810.67 in loss of profits damages allegedly resulting from effects of the Deepwater Horizon oil spill.⁴ The Claimant's loss calculation includes \$55,600.00 in investments in the property, \$263,000.00 in rent unpaid by the Claimant and due through 2013, as well as \$2,292.67 in unpaid maintenance charges for May of 2010.⁵

APPLICABLE LAW

Under the Oil Pollution Act of 1990 (OPA), at 33 U.S.C. § 2702(a), responsible parties are liable for removal costs and damages resulting from the discharge of oil into or upon the navigable

¹ Claim Cover Letter, 22 May 2012.

² Claim Cover Letter, 22 May 2012.

³ Claim Cover Letter, 22 May 2012.

⁴ Claim Cover Letter, 22 May 2012.

⁵ Claim Cover Letter, 22 May 2012.

waters or adjoining shorelines or the exclusive economic zone, as described in § 2702(b) of OPA.

The OSLTF which is administered by the NPFC, is available, pursuant to 33 U.S.C. § 2712(a)(4) and § 2713 and the OSLTF claims adjudication regulations at 33 C.F.R. Part 136, to pay claims for uncompensated damages. One type of damages available pursuant to 33 C.F.R. § 136.231 is a claim for loss of profits or impairment of earning capacity due to injury to or destruction of natural resources.

Under 33 C.F.R. § 136.233 a claimant must establish the following:

- (a) That real or personal property or natural resources have been injured, destroyed, or lost.
- (b) That the claimant's income was reduced as a consequence of injury to, destruction of, or loss of property or natural resources, and the amount of that reduction.
- (c) The amount of the claimant's profits or earnings in comparable periods and during the period when the claimed loss or impairment was suffered, as established by income tax returns, financial statements, and similar documents. In addition, comparative figures for profits or earnings for the same or similar activities outside of the area affected by the incident also must be established.
- (d) Whether alternative employment or business was available and undertaken and, if so, the amount of income received. All income that a claimant received as a result of the incident must be clearly indicated and any saved overhead and other normal expenses not incurred as a result of the incident must be established.

Under 33 C.F.R. § 136.105(a) and § 136.105(e)(6), the claimant bears the burden of providing to the NPFC, all evidence, information, and documentation deemed necessary by the Director, NPFC, to support the claim.

Under 33 C.F.R. § 136.235, the amount of compensation allowable for a claim involving loss of profits or impairment of earning capacity is limited to the actual net reduction or loss of earnings or profits suffered. Calculations for net reductions or losses must clearly reflect adjustments for—

- (a) All income resulting from the incident;
- (b) All income from alternative employment or business undertaken;
- (c) Potential income from alternative employment or business not undertake, but reasonably available;
- (d) Any saved overhead or normal expenses not incurred as a result of the incident; and
- (e) State, local, and Federal taxes.

Under 33 U.S.C. § 2712(f), payment of any claim or obligation by the Fund under OPA shall be subject to the United States Government acquiring by subrogation all rights of the claimant or State to recover from the responsible party.

DETERMINATION OF LOSS

Claimant's Submission to the OSLTF

To support this claim, the Claimant submitted the following documentation:

- Claim cover letter, 22 May 2012;
- Shareholder's agreement;

- Commercial Lease;
- Account statement, March 2010;
- Instructions for filing 2009 U.S. S Corporation Income Tax Return;
- 2009 Form 1120S, showing gross sales of \$167,622.00 and business income of (-32,219.00);
- CAM Payments report for 2009;
- Three Day Notice To Pay Rent, 3 June 2010;
- Florida Department of Revenue, Sales and Use Tax Return, May 2010;
- May 2010 sales record, showing taxable sales of \$19,083.35;
- IRS letter confirming Employer Identification Number, 4 February 2009;
- Certificate of Registration, showing opening date of 4/1/09; 2010 Florida Annual Resale Certificate for Sales Tax;
- Spreadsheet showing ownership percentages;
- April 2010 sales record, showing taxable sales of \$26,410.54;
- Notice of Acceptance of S Corporation, 16 March 2009;
- Minutes of the Special meeting of the Shareholders of La Trattoria, Inc., A Florida Corporation, 30 August 2009;
- Letter from the Claimant to Florida Department of Revenue, regarding inability to pay rent and exclusion from premises, 11 July 2010;
- Bank account documentation;
- Case Activity Listing by Creation Date, La Trattoria, showing that the company went out of business on 7 July 2010;
- Official mail Forwarding Change of Address Order;
- Profit and Loss Statement, February 2009 – June 2010;
- CenturyLink invoice, payment due by 14 May 2012;
- Florida Power & Light invoice, due 23 July 2010.
- Documentation contained on flash drive (251 pgs.):
 - 2009 Form 1120S;
 - 2009 Form 4562;
 - Letters to Shareholders regarding enclosures of Schedule K-1, 29 November 2011;
 - 2009 Schedule K-1 (Form 1120S);
 - 2009 S Corporation Information Worksheet;
 - 2009 Schedule M-1 Worksheet;
 - Tax Year 2010, Depreciation Reports;
 - Tax Year 2009, Depreciation and Amortization Report;
 - 2009 Form 1120S, Five Year Tax History;
 - 2010 Form 1120S;
 - 2010 Form 4562;
 - 2010 Schedule K-1 (Form 1120S);
 - 2010 Two Year Comparison (Form 1120S);
 - 2010 Financial Statement Ratio Analysis (Form 1120S);

Prior to presentment of this claim to the NPFC, the Claimant presented a Fourth Quarter Interim Payment Claim (ICQ42011) to the RP/GCCF, seeking loss of profits and earnings damages.⁶ The Claimant was assigned claimant ID 3569924 and the ICQ42011 was assigned claim # 9544988.⁷ The RP/GCCF issued a Deficiency Letter requesting documentation to support the Claimant's

⁶ GCCF Claimant Status, Accessed on 30 May 2012.

⁷ GCCF Deficiency Letter on Interim Payment/Final Payment Claim, 13 April 2012

alleged losses.⁸ Upon receipt of the requested documentation, the GCCF denied the Claimant's claim for failure to prove any losses caused by the oil spill.⁹ At the Claimant's request, the GCCF reevaluated the claim, and again denied the claim for the Claimant's failure to prove any losses caused by the oil spill.¹⁰

On 30 May 2012, the Claimant submitted this claim to the NPFC, seeking \$360,810.67 in loss of profits or impairment of earning capacity damages.¹¹ OPA requires that a claimant first present a claim for costs or damages to the RP prior to presentment to the NPFC.¹² Because the damages now presented to the NPFC have been first presented to and denied by the GCCF, the NPFC may properly adjudicate this claim for \$360,810.67 in loss of profits damages resulting from the closure of the Claimant's business.

Additionally, the NPFC notes that evidence presented in this claim submission indicates that the Claimant is a member of the economic damages class of the Deepwater Horizon oil spill economic and property damages class action settlement (E&PD Settlement).

NPFC Determination

Under 33 U.S.C. § 2702(b)(2)(E) and 33 C.F.R. Part 136, a claimant must prove that any loss of income was due to injury, destruction or loss of real or personal property or of a natural resource as a result of a discharge or substantial threat of a discharge of oil. Under 33 C.F.R. § 136.105(a) and § 136.105(e)(6), the claimant bears the burden of providing to the NPFC all evidence, information, and documentation deemed necessary by the Director, NPFC, to support this claim.

As an initial matter, it appears that the Claimant is a member of the E&PD Settlement. This claim is therefore considered to have been settled, and the Claimant is therefore ineligible to recover funds from the OSLTF. According to OPA, the payment of any claim by the NPFC is subject to the NPFC's ability to obtain, by subrogation, the rights to recover all costs and damages from the responsible party. If a claim has been settled, the Claimant no longer has rights to the claim and therefore cannot subrogate rights to the NPFC.

While this claim may not have been quantified or paid, it is considered to have been settled by virtue of the Court's preliminary approval of the settlement agreement. If the Claimant disagrees that he is a member of the economic damages class of the E&PD Settlement, he should submit evidence to indicate that he has either opted out or is excluded from the E&PD Settlement in his request for reconsideration of this claim.

Furthermore, this claim is denied under OPA's loss of profits damage category, as the Claimant has failed to prove that he has sustained a financial loss as a result of the Deepwater Horizon oil spill.

In order to prove a claim for loss of profits damages, a claimant must provide documentation sufficient to prove (1) that the claimant sustained an actual financial loss, and (2) that the loss was caused by the discharge of oil resulting from the Deepwater Horizon oil spill.

This claim is denied because the Claimant has failed to prove that his business lost revenue and was forced to close as a result of the Deepwater Horizon oil spill.

⁸ GCCF Deficiency Letter on Interim Payment/Final Payment Claim, 13 April 2012

⁹ GCCF Denial Letter on Interim Payment/Final Payment Claim, 28 April 2012

¹⁰ GCCF Re-Review Denial Letter on Interim Payment/Final Payment Claim, 13 May 2012

¹¹ Claim Cover Letter, 22 May 2012.

¹² 33 C.F.R. § 136.103(a).

Financial documentation included in this claim submission indicates that the Claimant recorded \$167,662.00 in gross sales in 2009, as compared to \$134,196.00 in 2010.¹³ The Claimant's restaurant was operational for approximately seven months of 2009 as compared to 5 months of 2010.¹⁴ The Claimant's gross sales therefore, averaged to approximately \$23,952.00 in 2009 as compared to \$26,839.00 in 2010. Financial records therefore fail to prove that the Claimant actually sustained a financial loss in 2010, following the Deepwater Horizon oil spill.

Furthermore, the Claimant indicated that the reduction in restaurant revenue from March to May of 2010 resulted in his inability to make rent payments as early as May of 2010.¹⁵ Because the oil spill did not begin until late April of 2010, it is clear that the Claimant's losses began prior to the Deepwater Horizon oil spill. The Claimant has not presented evidence sufficient to prove that the Deepwater Horizon oil spill, and not other factors affecting the Claimant's business prior to the spill, resulted in the closure of the Claimant's business on 7 July 2010.¹⁶

Additionally, the Claimant's assertions that the restaurant lost business as a result of decreases in tourism in Fort Myers, Florida, are unsupported by tourism statistics for the region, which indicate that tourist tax revenue was slightly higher in May of 2010 as compared to that month of previous years.¹⁷ Furthermore, statistics indicate that the Fort Myers region typically experiences a strong seasonal decrease in tourism from March to May as measured by tourism tax revenues.¹⁸ Therefore, the Claimant has not proven that any decrease in his revenue was due to the Deepwater Horizon oil spill as opposed to other seasonal or economic factors affecting the Fort Myers area.

Based on the foregoing, this claim is denied because the Claimant failed to meet his burden to demonstrate (1) that he sustained a loss in the amount of \$360,810.67, and (2) that the alleged loss is due to the injury, destruction or loss of property or natural resources as a result of a discharge or substantial threat of a discharge of oil, and (3) this claim is considered to have been settled by virtue of Claimant belonging to the economic damages class associated with the CSSP.

Claim Supervisor: *NPFC Claims Adjudication Division*

Date of Supervisor's Review: *7/26/12*

Supervisor's Action: *Denial approved*

Supervisor's Comments:

¹³ 2009, Form 1120S; 2010, Form 1120S.

¹⁴ Claim documentation indicates that the restaurant began operations in June of 2009 and closed by the end of May, 2010.

¹⁵ Claim Cover Letter, 22 May 2012.

¹⁶ Case Activity Listing by Creation Date, La Trattoria, showing official out of business date of 7 July 2010.

¹⁷ Statistics available at, http://www.fortmyersregionalpartnership.com/pdf/eir/Jul_10_EIR.pdf, Southwest Florida Economic Indicators Report, page 9, accessed on, June 29, 2012.

¹⁸ Statistics available at, http://www.fortmyersregionalpartnership.com/pdf/eir/Jul_10_EIR.pdf, Southwest Florida Economic Indicators Report, page 9, accessed on, June 29, 2012.